NEW YORK MORTGAGES AND THE RECORDING ACTS. *Edgar Logan.* Noting the difficulties of assignees of mortgages under recent conflicting New York decisions. 6 Colum. L. Rev. 547.

ORDINARY AND THE ULTIMATE PURCHASER, THE. *Bernard C. Steiner.* A treatment of the law of unfair competition so far as it relates to the protection of purchasers. 16 Yale L. J. 112.

PEREZ *v.* FERNANDEZ — CONFLICT BETWEEN CIVIL AND COMMON LAW IN OUR NEW POSSESSIONS. *Anon.* Criticizing the decision found in 202 U. S. 80 in which the court went far to continue a difference in procedure. 63 Cent. L. J. 411.

PROVINCE OF THE JUDGE AND OF THE JURY, THE. *G. Glover Alexander.* The historical development. 32 L. Mag. & Rev. 72.

REFORMS IN THE LAW OF FUTURE INTERESTS NEEDED IN ILLINOIS. I. *Albert Martin Kales.* 1 Ill. L. Rev. 311.

THEORY OF THE CASE, THE. *Anon.* Criticizing the tendency of the courts in code states to depart from the issue of the pleadings. 63 Cent. L. J. 395.

II. BOOK REVIEWS.

THE LAW OF RAILROAD RATE REGULATION, with Special Reference to American Legislation. By Joseph Henry Beale, Jr., and Bruce Wyman. Boston: William J. Nagel. 1906. pp. lii, 1285. 8vo.

This work will fill a general demand of the profession for a comprehensive and reliable work covering its subject. It deals with the subject from a broader standpoint than that of the Interstate Commerce Act alone. The authors consider the common law rules, the state statutory regulations, the Interstate Commerce Act, the decisions of the Interstate Commerce Commission, and the decisions of the state and federal courts. The present general demand for such a work is due to the Interstate Act Amendments of 1906, the age of all works on the subject, except those of Snyder and Judson, and the fact that they fail to deal with the common law and state statutes, which are at the very foundation of this subject.

To give sound advice, the common law, the state constitutions and statutes, and the national Constitution and statutes, must often be considered as a whole. Historically and legally, this clearly appears. In 1787 Congress was granted the power "to regulate commerce" (interstate). So far as Congress was concerned, this power remained almost unexercised until a century later, or 1887, when the first Interstate Commerce Act was passed. This act was passed because the attempts of the states to regulate the conduct of railways by the so-called Granger legislation and legislation of that character, in the early seventies, were nullified as to interstate traffic, October 25, 1886, by the necessary ruling of the Supreme Court in Wabash Ry. Co. *v.* Illinois (118 U. S. 557, 577) that regulation of interstate traffic by railroads "must be of a national character, and the regulation can only appropriately exist by general rules and principles which demand that it should be done by the Congress of the United States, under the commerce clause of the Constitution." The result of this decision was that existing state legislation regulating the railroads remained valid as to all transportation wholly confined to the state so legislating, but that, as to all commerce originating in one state or territory and passing into another, Congress alone had the power to regulate such commerce by statute.

Nor can the common law, out of which the statutes spring, be overlooked, because the Supreme Court early held: "Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally

to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." *C. N. & O. & T. P. R. Co.* v. *I. C. C.*, 162 U. S. 184. The traffic, however, that is not interstate, but is domestic, in large states like Texas, New York, Pennsylvania, Illinois, Ohio, and California, is enormous. It is governed by the common law, as modified by statute, and not by the Interstate Commerce Act.

The importance, then, of considering the common law, state statutes, and federal statutes, as a whole, when dealing with, or giving advice upon any phase of, this subject, is obvious, and the learned authors are to be congratulated upon being the first to issue a work covering the law upon this broad basis.

The point of view of the authors evidently is, to use their own words, that the railroad problem is to be dealt with for the present on the basis of existing statutes and decisions, whereby to "control . . . rates and practices of the railroads for public good." To throw light on the subject, they consider, among other topics, parliamentary regulation of rates, the persistence of state regulation, the theory of *laissez faire*, the growth of public employments, the power of eminent domain, the grant of exclusive franchise, monopoly as a ground for regulating public callings, requisites of common carriage, the transportation necessary, public business of common carriers, common carriers' right to compensation, primary duties of common carriers, excuses for refusal to serve, strikes, right to protect their own interests, limitations of their charges, right to return on capital, rate of return on capital, right to operating expenses, reasonableness of particular rates, elements involved in reasonable rates, classification of commodities, the effect of length of transportation upon rates, preventing discrimination between competitors and localities, Interstate Commerce Acts of England, the Granger and other state statutes, the Interstate Commerce Act of 1887, the Elkins Act, and the Interstate Commerce Act Amendments of 1906. Even the regulations of the Commission with reference to printing and publishing schedules of rates, and the procedure before the Commission, and in the courts, are considered.

The consideration of these topics is in the main most satisfactory, this being particularly true of the difficult one of discrimination in all its forms. No lawyer can examine the book upon "discrimination" without admiring the manner in which it traces the growth of the common law upon this subject, the complete lists of cases gathered in the notes, or the errors shown in a few able courts that have not kept pace with the growing common law. But this work is not infallible, even upon discrimination. For instance, the Wight case (167 U. S. 512), which holds a railroad cannot give free cartage to one shipper, just to get his shipments, while refusing it to all other shippers under like circumstances and conditions, is given prominence, and is frequently cited (§§ 724, 726, 742, and 748). The equally important unanimous decision of the Supreme Court, overruling a divided Commission, and holding that a railroad in one city to get traffic that might go to a rival may give free cartage to all passengers or freight to an outlying depot, that it may thus compete with such rival having a depot better situated, although it refuses free cartage to the same class of passengers or shippers in a neighboring competing city, where it is not so disadvantageously situated, is inadequately treated (§ 955). The Commission is cited to show that the classification of a single article, like hay, cannot be changed to increase its rate, without changing the question from one of the reasonableness of the advanced rate to one of "undue preference," but attention is not called, in that connection, to the report of the congressional committee creating the Commission, the opinion of Cooley, Chairman, in the early days of the Commission, and the early and repeated rulings of the courts that the railroads were left "free . . . to classify," if only their rates were not made unreasonable or unduly discriminatory (43 Fed. Rep. 51; 162 U. S. 184).

Naturally, the much cited "hay" case decided by the Commission (§§ 478, 556, 567, 596, 599, 917, 934, 943, 978, and 1077) was overruled by the courts (134 Fed. 942; 202 U. S. 613), and this fact should have appeared in the otherwise well-arranged, accurate, and valuable table of cases considering all kinds of freight, from "agate ware" to a "zinc slab" (§ 934). In spite of such omis-

sion, which may be due to the decision of that case by the Supreme Court about the time this work went to print, that table alone is worth the price of the work to a lawyer needing such information. This work, however, hardly puts sufficient stress upon a return load, car detention, or the difference between the cost of doing local and through freight carrying, when applied as tests to rates attacked as extortionate or discriminating. See *Ry.* v. *Tompkins*, 176 U. S. 178. As the Interstate Commerce Reports have demonstrated statistically for many years, if freight cars were loaded and unloaded with reasonable promptness, and return loads carried back at hardly any additional expense, the present freight car equipment of this country would be abundant wherewith to handle its freight traffic. Inability promptly to haul grain to market, or coal back, will be unheard of when railroads and shippers alike are compelled to pay a sufficient daily increasing detention charge upon cars detained to force their return to the company owning them within a reasonable time, instead of permitting shippers to use them for warehouses, or other railroads to use them in their business, because it is cheaper to use such cars than to build cars of their own. Within late years the Pennsylvania Railroad has frequently ordered from fifteen to twenty-five thousand freight cars in a single year, and yet it finds itself short of freight cars, not because it does not own enough such cars, but because they are improperly detained by shippers or other railroads. The extent of this detention may be judged from the fact that on the average a freight car travels only about thirty miles a day, whereas, if freight cars were not used for warehouses or improperly detained, this average ought to be at least doubled. Criticism, however, ought not to be made for not calling more specific attention to such facts, which are not understood or fully appreciated by a large portion of the railroad world. Some day, lawyers will learn the great importance of understanding such important railroad subjects, and a Hadley or an Acworth may be associated in the preparation of such a work, just as a doctor is quite frequently associated in preparing a work upon medical jurisprudence. Still, our authors show more insight into railroading than is common among able railroad lawyers, and from this and every other point of view their work is far superior to any other now dealing with this subject.

On the question of the constitutionality or "validity of statutes," as the authors put it, there is a reference to the principal cases, state and federal, beginning with § 1301, but it must be confessed the authors here appear rather timid, and inclined to proceed cautiously along the line of precisely what has been decided by the courts. They incline, evidently, to the position that the public good requires that the courts hold that Congress has the power to permit the Interstate Commerce Commission to fix *future* rates, although they admit that no express decision has yet been made so determining. They do not hazard the opinion that such a decision will be made, but they quote an opinion that is *obiter* pointing in that direction (§ 1339). The Supreme Court, however, did not mean to be so understood, for in a great case it has since said: "*If Congress has the power to fix such rates*, — and upon that question we express no opinion, — it does not choose to exercise its power in that way or to that extent." *Northern Securities Co.* v. *United States*, 193 U. S. 343. If Congress has that power, the greatest authorities hold it cannot be delegated to any other body. COOLEY, CONST. LIM., 163 and 174, and cases.

If any serious criticism is to be made at all on so thorough and learned a work, it is that it accords almost too much authority to the decisions of the Interstate Commerce Commission, and sometimes fails to give due weight to rulings of the courts the other way. The Commission in the beginning was a very learned body, presided over by the great and learned Cooley, in the full maturity of his powers; an author and judge who had had much experience with the railroad problem upon all sides of it, as a railroad receiver. Some of the most learned legal opinions that can be found on some of the great problems involved, were written by him, and are to be found in the first volume of the Interstate Commerce Reports. Later, commissioners resigned to accept larger salaries as counsel of railroads, or as officials of railroads, and their places were filled by men seeking their places because they had not the ability or reputation

to command such positions and salaries elsewhere. The Commission has remained a very learned body of men, of great experience and of irreproachable character, but its legal ability has not continued to be of the same high standard set in the beginning by the learned Cooley and his associates. The natural result has been that, of the decisions of the Commission that have been appealed, a large proportion have been reversed. It is but fair to say that but a small percentage of the decisions have been appealed from, and therefore the large percentage of reversals merely shows that the railroad lawyers have exercised good judgment about the decisions they have advised the railroads to comply with, and the decisions they have advised them to question by appeal. Still, the decision of the Commission being unquestioned in the great majority of these cases, it follows that this work necessarily gives weight to them in stating the law of the subject.

An appendix contains the rules of the Commission, forms of proceedings before the Commission, and a valuable table (p. 1178) by which to trace amendments in the Interstate Commerce Act. A table of cases cited shows that the authors have been industrious, and the index that follows makes it easy to turn to details not readily ascertained from the good table of contents in the beginning. The state acts affecting extortionate rates, personal discrimination, undue preference, local discrimination, or regulation by state railroad commissions, or courts, can be easily found from the table of contents.

It is a pleasure carefully to examine a work that sustains such examination so well, to find it both comprehensive and acute, to note the accuracy of its learning, the convenience of its arrangement, the practical quality of its usefulness, and to commend it generally to the profession, which is bound to find such works much more necessary and useful in the future than they have been in the past.

A. M.

A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS. By Howard S. Abbott. In three volumes. Volume III. St. Paul: Keefe-Davidson Company. 1906. pp. xvi, 1981–3045.

In November the REVIEW called attention to the first two volumes of this work. As the third and final volume, containing also the analytic index and the table of cases, has now been issued, it seems fitting to add a few words concerning this unquestionably good treatise.

About six hundred pages of this volume are devoted to the completion of the text. The chapter on "Public Property" is finished, the divisions treated in this volume being "Its Control and Use" and "Its Disposition." A chapter of one hundred and sixty pages is given to the discussion of the "Liability of Public Corporations for Negligence." In the chapter "Some Public Duties" division is broadly made into "Educational Duties" and "Charitable and Corrective Duties." The final chapter concerns "Actions by and against Public Corporations"; and such actions as *mandamus*, *certiorari*, *quo warranto*, and injunction are particularly adverted to.

An examination of the table of cases shows that certainly more than forty thousand cases have been cited. The author's promise of an "index unusually full and complete" seems to have been fulfilled. The index covers two hundred pages, and seems to contain roughly between ten and twelve thousand separate headings. One difficulty with the index, however, and perhaps with the scheme of division of the whole work, is that there are not enough intermediate headings, between the chief topics into which the whole subject naturally falls, and the ten or twelve thousand headings. Although with an index of the comprehensive character of the one furnished in this work, any topic discussed in the text can be found, the grouping of the headings into such large and general divisions renders the search for the reference wanted less easy. In the table of contents references are made only to sections. A reference to pages also would have been of some assistance.

The faults that exist in this treatise are such that they can be remedied easily